

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1751 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE A.R.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

UNITED INDIA INSURANCE CO.LTD.

Versus

ABUBAKAR UMAR SAMTHANIA

Appearance:

MR PV NANAVATI for Petitioner
MR RC S.M.Shah,ld.counsel with Mr. R.C.Kakkad for
the respondent.

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE A.R.DAVE

Date of decision: 25/07/96

ORAL JUDGEMENT

1. The appellant is the original defendant of the

Special Civil Suit No.82/93 of the court of Civil Judge (S.D.), Jamnagar. The suit was filed for getting claim under policy of insurance. The policy was a marine policy which covered the risk of a ship known as M.S.V. Safina Anware Mehboob bearing registration No.BDI 800. The policy was taken on or about 14-5-1986 and the vessel was covered for Rs.9,50,000/-.

2. On or about 17-5-1986 the vessel sunk near the coast of Oman and the crew landed on the shore. No life was lost but the vessel in which they were sailing was lost for ever.

3. As they did not have any papers, police of that country arrested them and took them into custody and finally with the intervention of representative of this country, they could manage to come back to India. The claim is for the said entire amount and the learned Trial Judge by his judgment and decree passed on 29-2-1996 has been pleased to allow the suit in its entirety and has also awarded interest at the rate of 12 % with costs.

4. The appeal was admitted and at the request of the appellant-Insurance Co. the original defendant, after calling the record from the trial court and the appellant having supplied paper book, it was taken up for final hearing. The learned advocate Shri P.V.Nanavati appeared for the appellant and learned advocate Shri R.C.Kakkad with Shri S.M.Shah as senior counsel appeared for the respondent-plaintiff.

5. The learned advocate Shri Nanavati submitted that the date of taking out insurance is 14-5-1986 and the date of alleged loss is 17-5-1986. It is too close to each-other and therefore, it gives rise to suspicion about the genuineness of claim.

6. Elaborating he further submitted that it being a matter of insurance claim for total loss based on sinking of ship on account of strong wind and huge waves as set out in the plaint, it was expected of the plaintiff-respondent to prove this claim by leading evidence.

7. From the record he pointed out that so far the plaintiff is concerned, only two witnesses are examined, one Abu Bakar Umar said to be the owner of the vessel and another witness Saleh Mohmad Musa who was one of the sailor at that vessel at the time of incident. By way of documentary evidence exchange of correspondence between the plaintiff and the defendant from Exh.19 to

Exh.26 has been produced of which Exh.24 and Exh.25 may be excluded because respectively they happen to be advise bill of policy and receipt of premium for the policy. Further documentary evidence is Exh.41 Custom Manifest dtd. 3-1-1986 and Casualty Form No.VI dtd. 31-7-1986.

8. Exh.42 no doubt indicates that so far as the authorities under the Indian Mercantile Ship Act,1923 are concerned, the said vessel is recorded as lost at sea and its casualty on that basis has been taken note of. In other words, from the record of the Surveyor in Charge,Mercantile Marine Department, Jamnagar, the registration of the vessel is struck off on the ground that it is lost at sea.

9. The learned advocate Shri Nanavati therefore,submitted that the documents in question and the oral testimony taken together are nothing else but statement of persons interested and unless therefore any independent corroborative material is brought before the court by itself, this evidence is not sufficient to grant a decree as done by the trial court.

10. It was pointed out by the other side that the plaintiff has led oral and documentary evidence both. The appellant-Insurance Co. however,had not lead any evidence whatsoever. It has rest content with filing the written statement Exh.15. The learned counsel Shri Shah therefore took us to the written statement and material portion pointed out in the written statement was to be found in para :8 and subsequent paras thereto. Paragraph : 8 indicates the defence of the appellant-Insurance Co. and portion thereof is extracted herein below.

"It is not admitted that the suit vessel is the same, which is alleged to have been insured with this defendant. It is not admitted that the suit vessel sank or lost in the sea as alleged in the plaint. The vessel which was insured with this defendant was insured only for a month and the said vessel has not been sunk or lost in the sea."

Paragraph 8 is fairly long one. Over and above, the extracted portion, it also reveals further defence of the appellant-company that the claim is bogus and concocted. Further, it is alleged that looking to the terms and conditions of the policy,the plaintiff is not entitled to get any amount. It is also alleged that the conditions of policy are violated. The contest is raised

to the extent that the vessel in question had not sailed out from India to any other country after it was insured.

11. Thereafter, in that very paragraph the company is putting the plaintiff to strict proof as to its averment in the plaint that the crew members of the vessel were arrested by Muskat Government and were sent to the prison and by the intervention of Indian Consulate they could come back. They have called upon the plaintiff to produce all the police papers and other relevant papers in respect of their arrest by the Muskat Government. As a possibility, it has pointed out that the crew members might have been arrested by the Government for some other illegal and unauthorised activity.

12. Further, it is stated in para : 8 that though the company had called upon the plaintiff to produce several documents, the plaintiff had not done so and these documents are shown from 1 to 15 at the written statement. The question of limitation is also raised and the suit is generally denied.

13. So far as the limitation is concerned, Article 44 (b) of the Indian Limitation Act, 1963 will be attracted and the date of denial of claim will have to be ascertained. Within 3 years of denial, the suit has to be filed.

14. The claim is not found to have been denied in clear terms and on the contrary correspondence between the parties has continued right upto 2-5-1989 Exh.23. The suit has been filed on 4-1-1992 accompanied by an application requesting for the permission to file the suit as an indigent person. This was C.M.A.No.5 of 1992 which came to be allowed on 1-5-1993.

15. The main question therefore, is whether on the basis of the material produced before the trial court in form of oral and documentary by the plaintiff, could the decree have been passed ?

16. Keeping this question before us, if the record is examined, we find first in point of time statement in form of casualty form No.VI dtd. 31-7-1986. It is a summary inquiry held by the authority under the said Mercantile Ship Act with a view to decide whether the vessel should continue to be registered or not. The document reveals that on the basis of the statement of the captain of that vessel i.e. "tandel" one Abdul Satar Umar Sumbhania the casualty has been recorded.

17. The material portion with regard to the sinking of the vessel is to be found at page 2 of the document where it is shown that when the vessel was on its way to Maskat after it passed Sacotra on 15-5-1986, weather condition worsened on account of strong wind and huge waves water started getting in and though both the pumps were working well, the inflow was so much that the engines stopped leaving the vessel at the mercy of the winds.

18. On the morning of 17-5-1986 at about 8-00 a.m. the vessel ran aground. All the crew members could swim to safety of the nearby shore, but the vessel was lost with entire cargo.

19. After this fact is recorded in the aforesaid manner, the plaintiff wrote to the Insurance Co. by Exh.19 dtd. 12-8-1886 that the vessel covered under the policy issued by the company having been lost, they are lodging the claim.

20. The company therefore, responded by Exh.20 letter dtd. 13-8-1986 therein it demanded as many as 11 details. The response of the plaintiff is to be found in Exh.21 dtd. 1-9-1986. The plaintiff gives the particulars as demanded with regard to items 2, 3, 4, 5, 6 and 7 and as to the cause of incident he refers to casualty VI and for the remaining items as to the statement made before various authorities, the plaintiff has come out with reply that their statements were not recorded. About fate of the crew item No.11, the information given is that they were all safe and sound. The company however, was not satisfied and, therefore, it wrote Exh.26 dtd. 8-7-1987 and expressed its doubt about the genuineness of the very transaction of the policy. In this background the plaintiff was called upon to remain present at Divisional Office of the Insurance Co. at Rajkot between 13-7-1987 to 17-7-1987 during working hours.

21. Whether the plaintiff remained present, if so, what transpired on that day, we are not informed because the plaintiff himself at Exh.27 is silent about this nor has the Insurance Co. produced any material in this regard. During the cross-examination of the plaintiff also no questions in this regard have been asked.

22. Suddenly the company after the said letter dtd. 8-7-1987 Exh.26 wrote letter Exh.22 on 24-4-1989 calling upon the plaintiff to furnish copy of Export General

Manifest obtained from Dar-E-Salam Custom/Port Authorities and statements of all crew members that were recorded in Jalali Jail, Muskat by the Ambassador/Consulate General of India in Oman. It has been replied by the plaintiff as per letters dtd. 27-4-1989 and 1-5-1989. These letters are not on record, however, reference to these letters is to be found in Exh.23 written by the appellant-company to the plaintiff on 2-5-1989 repeating its demand of the aforesaid two sets of papers. 3rd item is added which is whether report issued by India Meteorology Department Regarding Heavy Weather on 17-5-1986 between Raj Madaraka Kharia-moria Island. It has insisted upon plaintiff to prove his claim of total loss of the said vessel.

23. In this background, if we try to assess probative value of the evidence adduced by the plaintiff we should start with the said policy document in form of advice Exh.24. It may be noted here that the policy has not been brought on record by either of the parties. Document Exh.24- the advice form clearly carry a foot note that the company does not know about the vessel as on 14-5-1986 till 11-30 a.m. and liability as well responsibility of any claim arising till date and time will be that of the insured for the same vessel. This endorsement or foot note would mean that till 11-30 a.m. of 14-5-1986 the liability in respect of the vessel will be that of the insured. This would necessarily mean that on and after the said appointed time and the date the liability will be that of the Insurance Co.

24. The oral testimony of the plaintiff and his witness needless to say corroborates the case as set out in the plaint. They having deposed in the year 1985 and 1986, almost 9 to 10 years have passed and as such exact details as to the time and date may not be expected of them. The vessel having sunk is disclosed before the Shipping Authorities under the said Act as per Exh.42. One more document Exh.41 Manifest issued by Porbandar Custom Authorities indicates that the ship had left Porbandar Port on 3-1-1986 with cargo of Rice Bran. Amongst the crew as sailor as the said witness No.2 has set in the said Manifest No.2. His name appears at serial No.3. Amongst the names of the crew, the first name is that of the "tandel" shown seperately and his name tellies with the name given in Exh.42 as the tandel of the vessel.

25. The vessel seem to have therefore, sailed from Porbandar on 3-1-1986 and,thereafter, is found to have been lost on 17-5-1986 in between that the insurance has

been taken on 14-5-1986.

26. The insurance is for a period of full one year. Before that, the vessel seems to have been insured for a period of one mmonth as stated in the written statement.

27. The net result therefore, is that the contract of insurance is admitted. What is disputed is the fact of the insured vessel having sunk. In the cross-examination the questions were put as to whether the vessel was used for smuggling or any other illegal activities. About the doubt disclosed in Exh.26 on account of the sinking being too close to the date of taking insurance, no specific case is put in the written statement. No questions whatsoever have been asked in the cross-examination to the plaintiff.

28. As if this is not enough, document Exh.42 which has been produced alongwith Exh.41 during the deposition of the witness No.2, they having been produced after the deposition of the plaintiff was over, on behalf of the Insurance Co. as a defendant no attempt has been made to get the plaintiff cross-examined on this document or to prove by any material on record which may counter this evidence. As noted earlier, the Insurance Co. has not chosen not to lead any evidence except for the documents referred to earlier. There are no documents on record coming from the company. The documents in form of letters from the company are in fact produced by the plaintiff.

29. It may be mentioned here that Exh.41 and Exh.42 when produced in evidence on behalf of the plaintiff, objections were raised by the learned advocate appearing for the defendant in the trial court. However, except for the fact that they are copies, in our opinion, no objections could have been raised and even that would not survive because both documents happen to be public documents or copies thereof. Exh.41 is the certified copy of record of Suprintendent of Customs, Porbandar Port and Exh.42 is the true copy of the Casuality Form No.VI of Surveyor in Charge, Mercantile Department, Jamnagar. The plaintiff had sent a copy of Exh.42 to the Insurance Co. with his letter Exh.21.

30. In this background, the situation that emerges is that the company in para : 8 of the written statement has come out with a defence that the insured vessel is not sunk. This is not correct in view of the Exh.42. It clearly shows otherwise. No doubt Shri Nanavati is right that under the aforesaid Act, it being a summary inquiry,

it is not conclusive and it might be useful to the concerned authorities so far as the maintenance record is concerned. Further, when the plaintiff wants to establish his case of total loss, mere filing of casualty since would not be enough.

31. The hint to the suspicious nature of transaction given by the company in its letter Exh.26, as noted earlier, has not been followed up and further in any case, the defence is not raised on that line in the written statement.

32. What is therefore required to be considered is as to whether the said controversy as to vessel sunk is insured vessel or not can be said to have been established on the basis of preponderance of probabilities.

33. The evidence led by the plaintiff oral and documentary, indicates that according to the plaintiff the vessel has sunk which was the same vessel which was covered by the insurance policy. The vessel had left the country as per Manifest-Exh.41 on or about 3-1-1986. No questions have been asked to the plaintiff or to the witness No.2 as to what happened after it left Porbandar Port on 3-1-1986. The plaintiff on the contrary has come out with the case that the ship having left the shore of this country had safely arrived at Muskat. From there it had proceeded to Dar-E-Salam and on its return trip to Muskat, it was loaded with wooden logs and the mishap occurred that is why the insistence of the company in its letters Exh.22 and 23 for Manifest issued by Dar-E-Salam authorities. The plaintiff has right from the beginning said that except for the document sent by him under letter Exh.21 dtd. 1-9-1986, they do not have any other details with them. When the matter goes for trial and the company raised the specific plea of the vessel being not covered under the policy. The evidence on record being the only evidence of the plaintiff as narrated above on the preponderance of probability it is established that the vessel was the one that was insured.

34. Much has been made of the fact that the evidence could have been brought from authorities at Oman or at Dar-E-Salam by the plaintiff. The plaintiff had already declared his inability in the said letter of 1-9-1986. No doubt, the company has called upon the insured i.e. the plaintiff in the written statement to produce those details as set out in page 4 of the written statement at paragraph 8. However, it is not even suggested that those documents were either in possession or power of the

plaintiff, and, therefore, its non-production should lead to drawing of adverse inference.

35. The claim to the company has been reported on 12-8-1986 preceded by the said recording of tandel's statement of 31-7-1986. The incident of 17-5-1986 as per the statement of deposition of witness No.2, they were detained in jail and were in the foreign country for almost a month. This is how the delay in making report claim is sought to accounted for.

36. This being a civil litigation, when the material on record is the one that was produced by the plaintiff alone and the defendant having chosen not to lead any evidence, the conclusion arrived at by the trial court as to the vessel that sunk resulting in total loss on 17-5-1986 was the same vessel which was insured under the policy, in our opinion, cannot be said to be unwarranted. The case having been decided on preponderance of probabilities, we do not interfere with the same. The appeal is therefore, dismissed with costs.

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